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## **3-19.100 Regular Witnesses**

General assistance on witness matters is available by calling 202-307-1942 or 202-307-1943 or writing to the Simplified Acquisition Services, Attention: Special Authorizations, Procurement Services Staff, Justice Management Division, Suite 1040, National Place Building, Washington DC 20530.

The Department is authorized to pay for compensation of the following witnesses:

### **3-19.111 Expert Witness**

An expert witness qualifies as an expert by knowledge, skill, experience, training or education, and may testify in the form of an opinion or otherwise. (See Federal Rules of Evidence, Rules 702 and 703). The testimony must cover more than a mere recitation of facts. It should involve opinions on hypothetical situations, diagnoses, analyses of facts, drawing conclusions, etc., all which involve technical thought or effort independent of mere facts.

### **3-19.112 Fact Witness**

A fact witness is a person whose testimony consists of the recitation of facts and/or events, as opposed to an expert witness, whose testimony consists of the presentation of an opinion, a diagnosis, etc.

### **3-19.113 International Witness**

An international witness is a witness who resides outside the territory of the United States. They may be citizens of other countries or of the United States. The Department of Justice must observe the laws and regulations of the other countries when contacting these persons.

### **3-19.114 Protected Witness**

28 U.S.C. Sec. 524. Title V of Pub.L. No. 91-452 and 98-473 authorizes the Attorney General to provide for the security of government witnesses and potential witnesses, and members of their families.

### **3-19.120 Pre-Appearance Conferences**

In compliance with the following rules, pre-appearance conference days and/or separate trips by out-of-district witnesses can be approved by a supervisor in the trial office.

Pre-Appearance Conferences are meetings with witnesses to discuss their testimony in a pending trial, hearing, or grand jury proceeding. These meetings take place after the investigative stage of a case is completed and the trial, hearing, or grand jury proceeding has been scheduled. (Investigative interviews, i.e., interviews to discover the knowledge of prospective witnesses, cannot be funded from the Fees and Expenses of Witnesses (FEW) appropriation. Investigative interviews must be funded by the investigative agency or from the litigative funds of the office conducting the interviews.)

**A. Three days permitted.** DOJ Attorneys may authorize payments for pre-appearance conferences not to exceed three days (five days if a weekend is included) with a witness in the period between the scheduling of a trial, hearing, or grand jury proceeding and the witness's testimony.

**B. Separate Travel restricted.** Pre-appearance conferences with out-of district witnesses should be conducted immediately prior to the trial, hearing, or grand jury attendance. Travel by out-of-district witnesses for pre-appearance conferences separate from trial, hearing, or grand jury attendance cannot be approved by DOJ Trial Attorneys.

### **3-19.121 Subpoenas**

Praecipes for subpoenas for witnesses are not required by Rule 17(a), Fed. R. Cr. P., and Rule 45(a), Fed.R.Civ.P. Praecipes for subpoenas should not be prepared unless local rules or practice makes their use mandatory. Any praecipes necessary should be prepared by the United States Attorney or the Assistant in charge of the case.

### **3-19.122 Fees**

Public Law No. 101-650 Judicial Procedure increased the witness allowances provided for in 28 U.S.C. § 1821. The fee provided is \$40.00 per day.

For payment of fees and expenses of witnesses during a period of lapsed appropriation, see USAM 3-19.125.

### **3-19.123 Allowances**

The following miscellaneous rules govern witness fee allowances:

A. Allowances for per diem require that an overnight stay be involved. These allowances are based upon the allowances payable to government employees.

B. Unusual witness expenses such as babysitting fees, ambulance service, high seasonal accommodations, etc., which cannot be absorbed from witness allowances, require prior approval from Special Authorizations. Rental cars are not an allowable expense unless prior approval is obtained from Special Authorizations. If prior approval is not obtained from Special Authorizations, a witness may be reimbursed for taxi fares, not to exceed rental car expenses.

C. No constructive or double mileage fees shall be allowed for any person summoned both as a witness and a juror. See 28 U.S.C. Sec. 1824.

D. When a witness is subpoenaed in more than one case at the same court, only one travel fee and one per diem compensation shall be allowed for attendance. Both shall be allotted to the case first disposed of, after which the per diem attendance fee alone shall be allotted to the other cases in the order in which they are disposed of.

E. Witnesses who reside where the court sits shall not be paid for days on which court is not in session and no service is rendered.

F. No officer of any court of the United States located in any State, Territory or the District of Columbia shall be entitled to witness fees for attendance before any court or magistrate where he/she is officiating. See 5 U.S.C. Sec. 5537.

G. The Attorney General has ordered that mileage payable to witnesses shall be computed on the basis of highway distances as stated in any general accepted mileage guide which contains a short-line nationwide table of distances and which is designated by the Assistant Attorney General for Administration for such purpose. In areas for which no such mileage guide exists, mileage payable under 28 U.S.C. Sec. 1821 shall be based on the mode of travel used, the mileage of a usually-traveled route, and distances as generally accepted in that locality.

### **3-19.124 Advances**

Advances to witnesses for lodging, air and ground transportation tickets are available through a Government Travel Account (GTA). The GTA benefits both the witness and the United States Attorney's office by reducing the financial burden of the witness, simplifying travel arrangements, and improving lodging management.

### **3-19.125 Payment of Fees and Expenses of Witnesses During a Period of Lapsed Appropriations**

*See the EOUSA Resource Manual at 144.*

### **3-19.130 Certificate of Attendance and Payment**

Form OBD-3 (Fact Witness Voucher) is a three-part, four copy snap-out form and provides for certification of attendance by the United States Attorney for the regular (fact) witness claim for fees and allowances, and for payment of the claim by the appropriate paying office. Payments are made by the U.S. Marshal for the district in which the trial or hearing is held.

### **3-19.200 Witness' Expenses Incurred on Behalf of Indigent Persons**

Generally, expenses incurred on behalf of indigent persons will be handled in the same manner as expenses incurred on behalf of the government.

Certification of attendance is by a Federal Public Defender, U.S. District Judge, or Clerk of the Court.

For stenographic and notarial charges related to depositions, refer to Depositions, USAM 3-19.800.

Expenses pursuant to a court's order allowing witnesses for an indigent under Rule 17(b) may include those of state or federal guards, etc., in producing prisoners under writs of habeas corpus ad testificandum.

### **3-19.210 Responsible Payor**

The enactment of 18 U.S.C. Sec. 3006A resulted in changes of responsibility for payment of certain expenses of litigation for persons allowed to proceed in forma pauperis. *See* the EOUSA Resource Manual at 145.

### **3-19.300 Witnesses Residing Outside United States**

*See* USAM 3-19.820.

### **3-19.310 Subpoenas for U.S. Citizens and International Witnesses**

It is important that all United States Attorneys' offices and Department attorneys contact the Office of International Affairs (OIA) prior to contacting United States citizens and Alien residents who are in foreign countries and whose status as United States immigrants is unchanged.

### **3-19.312 Witness' Advance -- American Citizens -- Compensation for Necessary Travel to the United States**

American citizens are entitled to receive compensation for necessary travel to the United States. The Consular Mission can make such payments directly from Department of Justice FEW funds when effecting service of the subpoena, provided Special Authorizations, arranges for disbursing authorizations.

### **3-19.320 Foreign Nationals Residing in Foreign Countries -- Obtaining Attendance**

Since foreign nationals residing in the foreign countries are not subject to the subpoena power of U.S. Courts, their attendance can be obtained only on a voluntary basis. Obtaining testimony from foreign nationals is often a delicate matter, and care must be taken to avoid offending the sovereignty of the foreign country involved.

### **3-19.322 Witness Fees for Foreign Nationals**

The present witness allowances under 28 U.S.C. Sec. 1821 are generally acceptable to foreign nationals. Therefore, payment of the statutory rates, subsistence and actual cost of transportation may be made on the basis of the witness attendance certificate, and Form OBD-47 is not necessary.

### **3-19.340 Request for Foreign Counsel**

After the necessity for such counsel has been approved by the head of the division or office, the United States embassy or consulate in the country involved should be requested to furnish a list of qualified and suitable counsel. As a general policy, consular officers do not recommend a particular attorney with respect to private matters. However, in government cases, consular officers will recognize the government's interest and will be prepared to give information.

### **3-19.400 Federal Government Employees as Witnesses (Non-Military) -- Compliance with Subpoenas Duces Tecum**

Whenever such a subpoena is served on a United States Attorney or any other Department of Justice officer or employee, he/she should proceed in compliance with Departmental policy regarding property management, disclosure of information, and records management.

### **3-19.411 DOJ Employees Under Subpoena**

*See C.F.R. Sec. 16.21 et seq.*

When a subpoena is served on an officer or an employee of the Department by or on behalf of a private litigant, the Federal Rules of Civil Procedure (Rule 45(c)) require that the employee be tendered one day's witness fee plus mileage. Any other service is not legal service under the Rules.

Frequently, the purpose of the subpoena is served by the submission of documentary evidence or other written instrument to the court, instead of by personal appearance. If the substituted type of compliance is accepted by the litigant, it is the policy of the Department of Justice to consider that the fee and the mileage have been earned.

If the officer or employee complies with the subpoena by appearing in court in his/her official capacity, he/she must look to the private litigant for his/her fees and mileage. No charge will be made against annual leave. Any amount received in excess of actual expenses will be forwarded in the same manner as above. See Department of Justice Order 1630.1B (July 22, 1991).

If subpoenaed in his/her private capacity, on behalf of a private party, the Department of Justice employee will look to the litigant for fees and mileage. Such absences are charges to annual leave. All fees and mileage received are retained by the employee.

### **3-19.412 Serving a Subpoena Government Officers, Agents or Employees**

U.S. Marshals have been instructed that expenses of travel and subsistence solely for the purpose of serving subpoenas upon government officers, agents or employees should not be incurred. The United States Attorney may have subpoenas delivered by mail directly to the officer whose attendance is desired, or in the case of agents or other employees, to the head of the office in which they are employed, in sufficient time to enable them to acknowledge the receipt of the subpoenas specified.

Special Agents of the FBI and Federal Government agents generally should not be subpoenaed from distant points unless their testimony is material and there is every reason to believe that there will be no postponement of the trial.

Federal government employees may be secured by the United States Attorney through direct communication (preferable) with witness or subpoena. The employing agency should be requested to supply any necessary travel advance.

### **3-19.420 Federal Government Employees -- Witness Fees**

Federal government employees shall not be paid witness's fees but the period of such service shall be without loss of salary or compensation and shall not be deducted from any authorized leave of absence with pay. See 5 U.S.C. Secs. 5537 and 6322.

### **3-19.421 Federal Government Employees -- Expenses for Travel**

Any officer or employee of the United States or any agency thereof, summoned as a witness on behalf of the United States, shall be paid his/her necessary expenses incident to travel in accordance with the provisions of the Standardized Government Travel Regulations. *See* the EOUSA Resource Manual at 147.

### **3-19.500 Armed Forces Witnesses -- Military Personnel -- Fees and Travel Expenses**

The rules governing the payment of fees and travel expenses are the same for military employees as for nonmilitary employees. *See* USAM 3-19.420.

### **3-19.600 Prisoners as Witnesses**

A federal prisoner serving a sentence may be produced to testify or to be prosecuted in another district only upon a writ of habeas corpus in proper form. (Writs ad testificandum must not be used to produce federal prisoners for examination by United States Attorneys or investigative agencies.)

The marshal serving the writ of habeas corpus and the warden or superintendent having custody of the prisoner must be named in the writ. The marshal of the district in which the prisoner is in custody should serve the writ or, if this is impossible, the marshal in the issuing district may serve the writ requiring production of the prisoner.

A prisoner (federal, state, or county) in custody only as a material witness may be paid the regular attendance fee if testifying as a witness. Conversely, no attendance fee shall be paid to persons held on charges or already convicted, whether under state or federal law. Further, no mileage or per diem is allowable for any prisoners.

### **3-19.700 Expert Witnesses**

*See* the EOUSA Resource Manual at 147 *et seq.*

### **3-19.713 Interpreters**

The Court Interpreters Act of 1978 requires the Director, Administrative Office of the U.S. Courts (AOUSC) to "establish a program to facilitate the use of interpreters in courts of the United States." The AOUSC will prescribe standards for interpreter qualifications and will certify the qualifications of individuals who may serve as interpreters in bilingual proceedings and in proceedings involving persons whose hearing is impaired. All costs for interpreter services necessary to enable a party to comprehend the proceedings in the courtroom or in chambers, to communicate with counsel in the immediate environs of the courthouse in connection with ongoing judicial proceedings and to communicate with the presiding judicial officer are payable from funds appropriated to the judiciary. Interpreter services required by a criminal defendant to whom the government furnishes representation under the Criminal Justice Act are payable from funds appropriated to support that Act. The United States Attorney is generally chargeable only for interpreter services necessary to interpret the testimony of government witnesses. Although testimony situations are the most common occasion for the use of interpreters, interpreters may also be engaged for services necessary to determine the course of litigation. They may be paid for, or provided transportation, facilities, equipment or materials as necessary and appropriate to satisfy the United States Attorney's requirements.

Interpreters are required to execute a written oath as prescribed by AOUSC. The rate of compensation should be fixed by agreement with the interpreter before the interpreter renders the service required by the United States Attorney. Rates of compensation should correspond to rates paid by the court. The AOUSC regulation (Sec. 1.72) currently permits the presiding judicial officer to fix reasonable compensation according to the prevailing rates at the location where the designated interpreter regularly works.

It is the responsibility of the investigative agency to pay the costs to translate and transcribe recordings of foreign language telephone conversations obtained under authority of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 to 2520.

### **3-19.714 Payment of Expert Witnesses Appointed by the Court Under Federal Rules of Evidence**

Federal judges are allowed to appoint expert witnesses to assist the court in the performance of its duty on a particular case or proceeding under Fed.R.Evid. 706. The court may either appoint an expert of its own choosing or one agreed upon by both parties. The expert's deposition may be taken by any party and he/she may be called to testify by the court or any party.

**A. Criminal Proceedings and Civil Condemnation Proceedings.** The compensation of expert witnesses appointed by the court under Fed.R.Evid. 706 is payable from the appropriation "Fees and Expenses of Witnesses."

**B. Civil Proceedings.** Fed.R.Evid. 706 provides that in other civil actions, the compensation of court-appointed experts shall be paid by the parties in such proportions and at such times as the court directs. Any compensation charged to the Department of Justice will be paid from the appropriation "Fees and Expenses of Witnesses."

**C. Exclusions Under Fed.R.Evid. 706.** The appointment of expert witnesses for an indigent defendant in criminal cases or in civil habeas corpus cases is not provided under Fed.R.Evid. 706. In such instances, the Criminal Justice Act authorizes the court-appointed defense attorney to hire an expert witness on behalf of an indigent defendant. The expenses of the expert will be paid by the Administrative Office of the United States Court from funds appropriated for the implementation of the Criminal Justice Act.

### **3-19.720 FBI Services**

The FBI laboratory facilities are available for handwriting and typewriting comparisons and other document studies, as well as for studies in chemistry, toxicology, ballistics, hair, fibers, metallurgy, and other related subjects. The FBI is prepared to supply technical assistance and information in the fields of dynamics, electrical engineering, electricity, fluorescence, histology, light, mathematics, mechanical engineering, metallography, mineralogy, and physical chemistry.

To facilitate the assignment of expert witnesses from the FBI laboratory, it is desirable that as much notice as possible be given to the Bureau concerning the date upon which the testimony of the expert witness who has made a laboratory examination will be required.

There are no charges for FBI services.

### **3-19.730 Expert Witnesses -- Name-Check**



In the interest of internal security and the proper handling of the government's litigation, extreme caution should be exercised in the employment of expert witnesses, consultants, etc. In particular, careful consideration should be given to their professional ability, personal character and integrity, and loyalty to the country. If there is any doubt as to the latter, a name-check should be secured from the FBI.

### **3-19.740 Negotiations with Expert Witnesses**

Actual arrangements for expert witnesses must be made by the United States Attorney since he/she alone has the opportunity to explore the local situation. Through judicious negotiation and bargaining with prospective witnesses, the United States Attorney exerts a decided influence on the terms of the final arrangement.

### **3-19.800 Depositions**

Depositions should be taken whenever possible in order to reduce expenditures. This rule should be particularly applied when it is necessary to secure testimony of a witness living more than 100 miles from the place of trial.

Depositions should be taken before notarial officers or other officers authorized to administer oaths. See Rule 28, Fed.R.Civ.P. Depositions before United States Magistrates should be taken only when such other officers are not available.

### **3-19.811 Depositions Taken in a Foreign Country**

Depositions to be taken in a foreign country must be channeled through the State Department, Office of Special Consular Services, Washington, D.C.

### **3-19.812 Depositions at the Request of a Foreign Court**

The Office of International Affairs, Criminal Division, or the Office of Foreign Litigation, Civil Division should be consulted in the case of depositions to be taken in the United States at the request of a foreign court.

### **3-19.820 Payment of Travel Expenses of Defendant and Counsel to Attend Depositions Taken at the Instance of the Government**

As provided in 18 U.S.C. Sec. 3503(c), whenever a deposition is taken at the instance of the government, the court may direct that the expenses of travel and subsistence for the defendant and his/her attorney for attendance at the deposition be paid by the government. A November 26, 1975, Decision of Administrative Counsel (Justice Management Division), Department of Justice, stated that such costs are rightly the responsibility of the prosecution and should be paid by the division or office within the Department responsible for litigating the particular case.

### **3-19.830 Witnesses Under the Rules of Discovery**

Federal Rule of Civil Procedure 26 and Federal Rule of Criminal Procedure 16 allow either party to a suit to subpoena, with the permission of the court, the other party, certain records of the other party, and expert

witnesses of the other party, for examination for the purpose of discovering evidence the other party intends to present.

### **3-19.851 Psychiatric Examinations in Tort Cases**

Psychiatric examinations in tort cases, to determine the extent of injuries, require approval in the same manner as other expert witnesses are submitted. These examinations must not take place without written consent of the opposing counsel, or a court order under Fed.R. Civ.P. 35. An examination without written consent or a court order may leave the United States liable for a suit, by the person being examined, for violation of his/her civil rights.

### **3-19.852 Psychiatric Examinations in Criminal Cases**

All psychiatric examinations in criminal cases SHALL TAKE PLACE PURSUANT TO A COURT ORDER. A psychiatric examination which takes place without a court order may leave the United States liable for a suit, by the person being examined, for violation of his/her civil rights.